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No. 218

In the Supreme Court of the United States

OCTOBER TERM, 1960

I. E. DOGGETT, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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CITATIONS

Case:

Comstock v. *Group of Investors*, 335 U.S. 211 7

Statutes:

Internal Revenue Code of 1939, Sec. 293(b) (26 U.S.C. 1952 ed., Sec. 293(b)) 2, 7

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OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (Pet. 4a-18a) are not officially reported. The opinion of the Court of Appeals (Pet. 20a-27a) is reported at 275 F. 2d 823

JURISDICTION

The judgment of the Court of Appeals was entered on March 8, 1960. (Pet. 28a.) By order of the Chief Justice, entered June 6, 1960, the time for filing a petition for a writ of certiorari was extended to and including July 6, 1960. The petition was filed on July 6, 1960.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

Whether the two courts below had basis for finding that part of taxpayer's income tax deficiencies for the years 1942-1946 were due to fraud with intent to evade tax.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.
>
> * * * *
>
> (b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2).
>
> (26 U.S.C. 1952 ed., Sec. 293.)

STATEMENT

This case involves deficiencies in income tax and fraud penalties determined by the Commissioner for the years 1942 through 1946 in the total amount of $64,247.48 tax and $30,941.89 penalties. (Pet. 19a.) The deficiencies in tax arose out of various items (Pet. 5a); these are not in dispute, the taxpayer admitting that there were understatements of income in his return (Pet. 20). The principal controversy

before the Court of Appeals turned on the finding of fraud (Pet. 20a), and it is the finding of the courts below as to fraud which forms the basis of the petition for certiorari (Pet. 2-3). The facts relevant to that issue, as found by the Tax Court (Pet. 6a-12a), may be summarized as follows:

The taxpayer operated the Strop Taxi Company in Raleigh, North Carolina, as an individual proprietorship from 1933 to April 30, 1946, when he formed two corporations, the Yellow Cab Company, Inc., and the Strop Taxi Company, Inc. His fleet of cabs grew from eight in 1933 to fifty in 1946. (Pet. 6a.)

In April, 1941, the taxpayer hired Linwood T. Hobgood as a bookkeeper, Hobgood remaining employed in that capacity until February, 1947. The taxpayer informed Hobgood within the first year of his employment that the taxpayer's income was getting so large that he did not feel that he should have to pay the Government income tax on all of it. The taxpayer instructed Hobgood to reduce these income taxes in any way he could. To this purpose Hobgood used a number of different methods during the years 1942 through 1946. One method used by Hobgood to conceal income was to inflate business expenses upon posting to the ledger. (Pet. 6a.) He also credited many income items directly to the taxpayer's drawing account, thereby by-passing the "income" or "receipts" account. Another method of concealing income was by recording personal expenditures as business expenses. (Pet. 7a.)

One of the principal methods used to understate taxable income during the years 1944 and 1945 was

to fail to record some of the receipts in the journal after having properly recorded them in the cash book. During these years the variance between the receipts as recorded in the journal and as reflected in the cash book aggregated $27,825 and $10,025 respectively. Hobgood placed the withheld cash on the taxpayer's desk, after attaching an adding machine tape showing the amount of daily receipts and how much had been withheld. The taxpayer or his wife checked the drivers' receipts almost every day. The taxpayer understood the cash book. It was kept principally by Hobgood with occasional entries being made by both J. M. Neal, the taxpayer's personnel manager, and by the taxpayer. The cash book was kept for the taxpayer's information and was not maintained with the journals and ledgers but was kept separately. (Pet. 7a-8a.) The taxpayer accumulated the withheld cash in a safe in his office and periodically removed it. (Pet. 8a.)

Only the journal and ledger were made available to the certified public accounting firm by Hobgood for the preparation of the taxpayer's income tax returns. The cash books were never made available to them. (Pet. 8a.) When a revenue agent was making an examination of the taxpayer's records, the cash book was not offered to him until after he had been working on the case several weeks and had proposed a deficiency. There is a conflict of testimony as to whether it was the taxpayer or his accountant who ultimately produced the cash book, and the Tax Court made no finding on that point. (Pet. 15a.)

The Court of Appeals noted that the revenue agent

testified at the trial that he had not seen the cash book until his routine examination was complete, but he had no present recollection about how the cash book came into his possession. Shown an affidavit he had executed at a time more nearly contemporaneous with the event, he stated the affidavit was correct. In the affidavit he had sworn that he found the cash book in a safe in the taxpayer's office and that the taxpayer had not given it to him. (Pet. 24a.)

During the years 1942 through 1946, the taxpayer maintained a safe deposit box at the Wachovia Bank & Trust Company. During the initial stages of his investigation, on Friday, May 9, 1947, at approximately noon, the revenue agent asked the taxpayer if he would accompany the agent to the bank to inventory the contents of the safe deposit box. The taxpayer informed the agent that he could not leave his place of business. An appointment was made to inventory the contents of the box on the following Monday, May 12, 1947, and no cash was found. The taxpayer had entered his safety deposit box less than an hour after the agent left his place of business on Friday, May 9, 1947. (Pet. 12a.)

On February 21, 1951, the taxpayer, on a plea of *nolo contendere*, was convicted on a three-count indictment charging the filing of false and fraudulent returns with intent to evade for the years 1944 through 1946. On April 6, 1951, he was fined $30,000 and the costs of prosecution. (Pet. 12a.)

The Tax Court found that the taxpayer's returns for each of the years 1942, 1944, 1945 and 1946 were false and fraudulent with intent to evade tax;

and that some part of each of the deficiencies in income tax for the years 1942 through 1946 was due to fraud with intent to evade income tax. (Pet. 12a.)

In its opinion the Tax Court noted that the case involved a basic conflict of testimony, with the taxpayer asserting that Hobgood's testimony was false and that Hobgood had been guilty of continuous and systematic embezzlement from the business. The court's findings, outlined above, reflect its conclusion that the statements of the bookkeeper, rather than the taxpayer, are entitled to credence. (Pet. 13a.) Among the facts which led the court, as it stated, to this conclusion, were the following: that the conviction on the plea of *nolo contendere* affects the credibility of the taxpayer's statements; that the other evidence supports Hobgood's statements; that the conceded understatements of income are so large that the taxpayer must have been aware of them; and that the cash book was not shown to the revenue agent until the close of his investigation. (Pet. 13a-15a.) Upon an independent review of the record, the Court of Appeals accepted the findings of the Tax Court. (Pet. 20a-26a.)

ARGUMENT

The issue in this case is a purely factual one—whether the systematic falsification of taxpayer's books and records and the repeated and substantial understatements of taxpayer's income were the result of a fraudulent purpose, on the part of taxpayer, to evade income tax; or whether these occurrences took

place, unbeknownst to taxpayer, because of the secret machinations of taxpayer's bookkeeper. The Tax Court found that there was fraud on taxpayer's part and imposed additions to tax as provided in Section 293(b) of the 1939 Code (*supra*, p. 2). The Court of Appeals, carefully reviewing the evidence and findings, has concluded that the Tax Court was "fair and objective" and that its findings are fully supported by the record. On the face of it, the case against taxpayer is a very strong and convincing one. In all events there are no exceptional circumstances which would warrant a further review of the concurrent findings of the courts below. See *Comstock* v. *Group of Investors*, 335 U.S. 211, 214.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 1960.

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